Guideline Sentencing Update

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Adjustments

Multiple Counts—Grouping

Ninth Circuit holds that drug conspiracy and money laundering counts should be grouped. Defendant was convicted of conspiracy to distribute drugs and money laundering, and the evidence showed that the laundered money came from the drug business. She appealed the district court's refusal to group the conspiracy and money laundering counts for sentencing purposes. The appellate court reversed and remanded for resentencing.

"Section 3D1.2 permits grouping of closely related counts. Subsection (b) permits grouping '[w]hen counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.'" The court found that defendant's "crimes satisfy the first requirement of subsection (b) of §3D1.2. Victimless crimes, such as those involved here, are treated as involving the same victim 'when the societal interests that are harmed are closely related.' U.S.S.G. §3D1.2, Application Note 2."

"The money laundering prohibition was adopted as part of the Anti-Drug Abuse Act of 1986. . . . The societal interests harmed by money laundering and drug trafficking are closely related: Narcotics trafficking enables traffickers to reap illicit financial gains and inflict the detrimental effects of narcotics use upon our society; money laundering enables criminals to obtain the benefits of income gained from illicit activities, particularly drug trafficking and organized crime. *See also Most Frequently Asked Questions About the Sentencing Guidelines* 20 (7th ed. 1994) ('[B]ecause money laundering is a type of statutory offense that facilitates the completion of some other underlying offense, it is conceptually appropriate to treat a money laundering offense as "closely intertwined" and groupable with the underlying offense.'). . . . Grouping the crimes of conspirators who engage in both trafficking and laundering merely implements the Sentencing Commission's direction to group closely related counts." The court disagreed with the Fifth and Eleventh Circuits, which "have held that the societal interests implicated by drug trafficking and money laundering are not closely related because narcotics distribution 'increas[es] lawlessness and violence' while 'money laundering disperses capital from lawfully operating economic institutions.' *U.S. v. Gallo,* 927 F.2d 815, 824 (5th Cir. 1991); *see also U.S. v. Harper,* 972 F.2d 321, 322 (11th Cir. 1992)."

The court also concluded that defendant's offenses "satisfy the second requirement of subsection (b) of §3D1.2. Lopez's acts of drug trafficking and money laundering were connected by a common criminal objective. Lopez laundered money to conceal the conspiracy's drug trafficking and thus facilitated the accomplishment of the conspiracy's ultimate objective of obtaining the financial benefits of drug trafficking."

U.S. v. Lopez, 104 F.3d 1149, 1150–51 (9th Cir. 1997) (per curiam) (Fernandez, J., dissenting).

See *Outline* at III.D.1

Departures

Mitigating Circumstances

Fourth Circuit rejects departing when §5G1.3 does not give credit for previously discharged related sentence. Defendant was convicted on a drug conspiracy charge in 1988. That conviction served as a predicate offense for a CCE charge, to which he pled guilty in July 1992 after two years of preindictment and pretrial negotiations and delays. Defendant was still serving the related 1988 sentence when he was convicted in 1992, but had finished it by the time he was sentenced on the CCE conviction in 1994. Had the 1988 term still been undischarged, credit for time served could have been given under §5G1.3(b) & comment. (n.2). Finding that the Guidelines did not adequately account for a related sentence's being already discharged, the district court departed downward to give defendant credit for the time he had served.

The appellate court vacated the departure. "The Sentencing Guidelines expressly permit district courts to give sentencing credit only for terms of imprisonment 'result[ing] from offense(s) that have been fully taken into account in the determination of the offense level for the instant offense' if the previous term of imprisonment is 'undischarged.' U.S.S.G. §5G1.3. The Application Notes and Background Statement to §5G1.3 similarly limit its application to *undischarged* terms of imprisonment. And, despite several amendments to the Sentencing Guidelines, the Sentencing Commission has not altered §5G1.3 to include credit for discharged sentences. . . . [W]e conclude that the Sentencing Commission did not leave unaddressed the question of whether a sentencing judge can give credit for discharged sentences, but rather consciously denied that authority."

The court also rejected defendant's claim that departure was warranted because the 22-month delay between conviction and sentencing rendered §5G1.3 inap-

plicable. "The Sentencing Guidelines . . . direct district courts to determine credit for prior sentences at the time of sentencing and provide no exceptions for cases in which the defendant's sentencing has been delayed. Moreover, it was McHan who is principally responsible for bringing about delays in his trial and sentencing by engaging in proactive negotiation and sometimes dilatory litigation. At least where there is no indication that the government intentionally delayed the defendant's processing for the purpose of rendering §5G1.3(c) inapplicable, we decline to undermine the Sentencing Guidelines' general preference for repose and specific preference for denying sentencing credit for previously discharged sentences."

U.S. v. McHan, 101 F.3d 1027, 1040 (4th Cir. 1996) (Hall, J., dissenting). *Contra U.S. v. Blackwell*, 49 F.3d 1232, 1241–42 (7th Cir. 1995) (on remand, district court may consider departure because §5G1.3 does not cover situation where related sentence was already discharged).

See *Outline* at V.A.3

Eighth Circuit holds that §3553(e) motion has no time limit and may be made by government in conjunction with defendant's §3582(c)(2) motion. Defendant received a §5K1.1 substantial assistance reduction at his sentencing and, after another year of assistance, a further reduction under Fed. R. Civ. P. 35(b) to a sentence of 131 months, a 55% reduction from the original guideline minimum. Later, defendant moved for a sentence reduction under 18 U.S.C. §3582(c)(2), based on a retroactive guideline amendment. The government urged the court to grant the motion and reduce defendant's sentence to 106 months, which would equal a 55% reduction from the amended guideline minimum. Because this would fall below the 120-month statutory minimum, the government also made a motion under §3553(e). The court granted defendant's motion, but concluded that the government could not invoke §3553(e) in the context of a §3582(c)(2) motion and reduced the sentence to the 120-month minimum.

The appellate court remanded for reconsideration. "Section 3582(c)(2) does not itself authorize a reduction below the statutory minimum, . . . but the benefit accruing from a lowered sentencing range is independent of any substantial-assistance considerations. In order that a defendant may receive the full benefit of both a change in sentencing range and the assistance the defendant has previously rendered, we conclude that the government may seek a section 3553(e) reduction below the statutory minimum in conjunction with a section 3582(c)(2) reduction. Section 3553(e) contains no time limitation foreclosing such a conclusion."

U.S. v. Williams, 103 F.3d 57, 58 (8th Cir. 1996) (per curiam).

See *Outline* at I.E and VI.F.3

Violation of Supervised Release

Sentencing

Ninth Circuit holds that revocation sentence may be reduced under §3582(c)(2) when already-served sentence for underlying conviction could have been reduced by a later amendment. Defendant pled guilty to a marijuana offense in 1991. After completing his 51-month sentence in March 1995, he began serving his term of supervised release. Three months later, defendant violated the conditions of his release and was sentenced to seven months in prison. In November 1995, an amendment to §2D1.1 changed the method of calculating quantity for offenses involving marijuana plants. The amendment was made retroactive and, if it could have been applied to defendant, would have reduced his original guideline range from 51–63 months to 27–33 months. Defendant filed a motion pursuant to 18 U.S.C. §3582(c), requesting that his sentence on the violation of release be reduced to time served. The district court did so.

"The question presented is whether the district court had discretion under section 3582(c)(2) to reduce Etherton's sentence pursuant to the revocation of supervised release." Section 3582(c)(2) allows a court to "modify a term of imprisonment . . . in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." The appellate court determined that this section could be applied to reduce the sentence for the release violation. "The seven months imprisonment is not punishment for a new substantive offense, rather 'it is the original sentence that is executed when the defendant is returned to prison after a violation of the terms of . . . supervised release.' . . . [W]e interpret the statute's directive that 'the court may reduce the term of imprisonment' as extending to the entirety of the original sentence, including terms of imprisonment imposed upon revocation of supervised release."

U.S. v. Etherton, 101 F.3d 80, 81 (9th Cir. 1996) (Nelson, J., dissenting). *Cf. U.S. v. Trujeque,* 100 F.3d 869, 871 (10th Cir. 1996) (remanded: because defendant's sentence under Fed. R. Crim. P. 11(e)(1)(C) was based on a valid plea agreement and not "on a sentencing range that has subsequently been lowered by the Sentencing Commission," §3582(c)(2) cannot be applied and his motion to lower his sentence should have been dismissed).

See *Outline* at I.E and VII.B.1

Offense Conduct

Relevant Conduct

Eighth Circuit holds defendants responsible for cocaine shipment they were directly involved with despite their claim that they expected to receive marijuana. Defendants agreed to accept deliveries of pack-

ages containing marijuana for another person. After two successful deliveries, a third package was intercepted and, after a controlled delivery, defendants were arrested. The third package contained cocaine rather than marijuana. Defendants pled guilty to conspiring to distribute and possess with intent to distribute controlled substances. At sentencing, the district court held defendants accountable for the cocaine shipment despite their claims that they were expecting another marijuana shipment and could not reasonably foresee that cocaine would be in the package.

The appellate court affirmed, although it concluded "that it would have been more fitting to assess the conspirators' responsibility for the cocaine under Guideline §1B1.3(a)(1)(A). Unlike paragraph (a)(1)(B), which the district court utilized to hold [defendants] liable for the 'acts and omissions of others,' paragraph (a)(1)(A) appertains to conduct personally undertaken by the defendant being sentenced." Application Note 2 states that "the defendant is accountable for all quantities of contraband with which he was directly involved. . . . The requirement of reasonable foreseeability applies only in respect to the conduct (i.e., acts and omissions) of others under subsection (a)(1)(B). It does not apply to conduct that the defendant personally undertakes . . . ; such conduct is addressed under subsection (a)(1)(A)."

"Mindful of these precepts, we have no difficulty in determining that the district court correctly attributed the 239.5 grams of cocaine to [defendants]. Through their own actions, the two men aided, abetted, and wilfully caused the conveyance . . . of at least three packages. . . . Their convictions verify that they embarked upon this behavior with the requisite criminal intent and with every expectation of receiving some type of illegal drug to distribute. Accordingly, . . . they are accountable at sentencing for the full quantity of all illegal drugs located within the parcels."

U.S. v. Strange, 102 F.3d 356, 359–61 (8th Cir. 1996).

See *Outline* at II.A.2

Second Circuit requires "specific evidence" of defendant's involvement before counting drug amounts from uncharged relevant conduct. Defendant was convicted of drug charges after being caught attempting to import heroin on a plane flight from Nigeria. His sentence was first based on the 427.4 grams of heroin contained in balloons he had swallowed. The district court then found that defendant had made seven other trips to Nigeria for the purpose of importing heroin, concluded that it was reasonable to assume that the same amount of heroin was involved in all eight trips, and used the total of 3,419.2 grams as relevant conduct to set the offense level. The appellate court remanded for resentencing, holding that there must be "specific evidence—*e.g.*, drug records, admissions or live testimony—to calculate drug quantities for sentencing purposes," and that no such evidence had been shown to support the extra amounts of heroin.

On remand, the district court conducted a sentencing hearing that produced extensive statistical evidence and other information relating to quantities carried by heroin swallowers from Nigeria who were arrested at JFK Airport during the time defendant made his trips; plus, other district judges were surveyed on their experiences with heroin swallowers. The district court also relied on defendant's statements at the time of arrest and his demeanor at trial and sentencing, concluding that the evidence supported a finding that he was responsible for carrying between 1,000 and 3,000 grams of heroin.

The appellate court vacated the sentence. Although the preponderance of evidence standard is generally used for resolving disputed facts at sentencing, "we have ruled that a more rigorous standard should be used in determining disputed aspects of relevant conduct where such conduct, if proven, will significantly enhance a sentence. *See U.S. v. Gigante*, 94 F.3d 53, 56–57 (2d Cir. 1996). . . . The 'specific evidence' we required [in the previous opinion] to prove a relevant-conduct quantity of drugs for purposes of enhancing a sentence must be evidence that points specifically to a drug quantity for which the defendant is responsible." The court reasoned that "under the Sentencing Guidelines, evidence tending to prove 'relevant conduct' is not merely taken into consideration at sentencing, it *determines* sentencing (subject only to departure authority), and it does so at the same level of severity as if the defendant had been convicted of the relevant conduct. That circumstance prompted us to require 'specific evidence' of a 'relevant conduct' drug quantity, and we adhere to that requirement."

The "items of evidence [used by the district court] are not 'specific evidence' of drug quantities carried by Shonubi on his prior seven trips. . . . The DEA records informed [the court] of what 117 other balloon swallowers from Nigeria had done during the same time period as Shonubi's eight trips. Those records of other defendants' crimes arguably provided some basis for an estimate of the quantities that were carried by Shonubi on his seven prior trips, but they are not 'specific evidence' of the quantities he carried." Similarly, the other evidence "relates to Shonubi specifically," but does "not provide 'specific evidence' of the quantities carried on his prior seven trips." The court then ruled that, "[s]ince the Government has now had two opportunities to present the required 'specific evidence' to the sentencing court, no further opportunity is warranted, and the case must be remanded for imposition of a sentence based on the quantity of drugs Shonubi carried on the night of his arrest."

U.S. v. Shonubi, 103 F.3d 1085, 1087–92 (2d Cir. 1997).

See *Outline* at I.A.3, II.A.1 and B.4.d, and IX.B

General Application Principles

Amendments

Eighth Circuit holds that sentencing court was bound by original drug quantity finding when considering whether to apply retroactive amendment. Defendant and his son were arrested after federal agents discovered 110 marijuana plants on his property. In accordance with a plea agreement, defendant was reindicted and charged with manufacturing 73 marijuana plants; his son was charged with manufacturing 37 plants. The government and defendant stipulated that 73 plants were attributable to defendant, the presentence report stated that defendant was accountable for 73 plants, and the district court sentenced him to 30 months on that basis. After Amendment 516 to §2D1.1(c) retroactively changed the weight equivalence of marijuana plants for sentencing purposes from 1 kilogram to 100 grams, defendant filed motions to have his sentence reconsidered pursuant to 18 U.S.C. §3582(c)(2). The court denied the motions, stating in part that defendant could have been held accountable for 110 plants, which would have resulted in a statutory mandatory minimum sentence of 60 months.

The appellate court remanded, concluding that "the district court was bound by its previous determination with respect to the number of marijuana plants that was relevant to Mr. Adams's sentence. In the first place, although the finding is perhaps not technically *res judicata*, it is unusual, for efficiency reasons if no other, for trial courts to revisit factual findings. In the second place, the district court had already made a finding that the seventy-three plants for which Mr. Adams was going to be held responsible 'adequately reflect[ed] the seriousness of the actual offense behavior,' else the court could not have approved the reduction in the charges against Mr. Adams at all. *See* U.S.S.G. §6B1.2(a). In the third place, the sentencing guidelines direct a district court in situations like the present one to 'consider the sentence that it would have imposed had the amendment[] . . . been in effect' at the time of the original sentencing. *See* U.S.S.G. §1B1.10(b). We think it implicit in this directive that the district court is to leave all of its previous factual decisions intact when deciding whether to apply a guideline retroactively."

U.S. v. Adams, 104 F.3d 1028, 1030–31 (8th Cir. 1997). *See also U.S. v. Cothran*, 106 F.3d 1560, 1562–63 (11th Cir. 1997) (citing *Adams*, affirming district court's refusal during §3582(c)(2) hearing to reconsider number of marijuana plants that defendant had not contested at original sentencing—"§3582(c)(2) and related sentencing guidelines do not contemplate a full *de novo* resentencing").

See *Outline* at I.E

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